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United States Court of Appeals

For the Second Circuit

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs-Appellants,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANTS' BRIEF

HARRY NORMAN BALL,
JOSEPH G. FELDMAN,
1010 Packard Building,
Philadelphia 2, Pa.
and
LIPPER, SHINN & KEELEY,
521 Fifth Avenue,
New York 17, N. Y.
Attorneys for Plaintiffs-Appellants.

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United States Court of Appeals

For the Second Circuit

Civ. 110-388

[SAME TITLE]

Docket Entries

[A]

ATTORNEYS

For Plaintiff:

HARRY NORMAN BALL

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AARON LIPPER
527 5th Ave. (17)
MU 2-5780

For Defendant:

HAIGHT GARDNER POOR & HAVENS
80 Broad St. (4)

BASIS OF ACTION: Personal Injury—Death

Trial by Jury by pltf. 6-28-56

Date	Account	Received	Disbursed
6/28/56	A. Lipper	15—	
6/29/56	Pd N G Tuss		15—
12-26-56	L. S. & K.	5—	
12-27-56	Pov. S. Tsy		5—

Docket Entries

Date	Filings—Proceedings	Attorneys Plf.	Attorneys Deft.
June 28-56	Filed complaint and issued summons		
July 2-56	Filed Order granting pltf. leave to serve notice of examination of Jose Mendoza, Jose R. Roncajolo & Anthony Prago. Weinfeld, J.	x	
July 25-56	Filed Notice of Motion to dismiss (with copy of complaint attached) Ret. 7-31-56		x
Aug. 1-56	Filed summons and return. Served deft. on 7-9-56		
Aug. 22-56	Filed Opinion #22,887 Motion to dismiss granted. Settle order, Cashin, J.		
Sept. 19-56	Filed Pltf's unsigned order.		
Sept. 19-56	Filed Pltf's copy of unsigned order.		
Sept. 19-56	Filed Pltff's unsigned order.		
Sept. 14-56	" Notice of Motion to dismiss amended complaint—Ret. 9-25-56		x
Sept. 19-56	" Order dismissing complaint without prejudice to pltf's right to institute a suit in admiralty, Cashin, J.—Judgment entered. Mailed Notice of Entry 9-20-56		

Docket Entries

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Sept. 25-56	" Amended Complaint (see admission of service on back dated 8-21-56)		
[B]			
Nov. 30-56	Filed Opinion No. 23,064 granting deft's motion to dismiss 2nd amended complaint, Cashin, J. Mailed notice of entry 11-30-56		
Sept. 27-56	Memo End. on Motion filed 9-14-56: Referred to Judge Cashin, Edelstein, J.		
Nov. 30-56	Filed Reply affdvt. in opposition to deft's motion to dismiss amended complaint.		x
Nov. 30-56	Filed supplemental affdvt.		x
Dec. 26-56	Filed Notice of Appeal. Mailed copy to Haight Gardner Poor & Havens		

A True Copy

ROBERT A. CHARISON, Clerk
RAOUL BRUGO, Deputy Clerk

[SEAL]

Order Appealed From

[37] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 110-388

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

• • •

[40] Defendant's Motion to dismiss the complaint on the ground that the Court does not have jurisdiction of the subject matter of the suit as a civil action is granted.

Dated: New York, New York
November 29, 1956

JOHN M. CASHIN
U. S. D. C.

Complaint

[1] IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

$15.—

Civil Action No. 110-388

Jury Trial demanded

RUTH NOEL

vs.

LINEA AEROPOSTAL VENEZOLANA

---

1. At the times and places herein mentioned the defendant, LINEA AEROPOSTAL VENEZOLANA, was and now is a common carrier by air, operating aircraft for transportation of passengers, mail and baggage for hire, and was operating under a certificate of the Civil Aeronautics Board of the United States Government, to provide international air transport service.

2. On or about June 19, 1956, MARSHAL L. NOEL was a fare-paying passenger of defendant from New York, N. Y., to Caracas, Venezuela, on a 4-engine Super Constellation aircraft owned, operated and controlled by defendant

through its servants, agents or employes in the course of employment, designated as Flight 253, which departed from Idlewild Airport, New York, on or about 11:15 P. M. o'clock Tuesday, June 19, 1956.

3. Defendant failed to safely convey the said MARSHAL L. NOEL from New York to Caracas, but, on the contrary, on or about Wednesday, June 20, 1956, at or about 4:30 A. M. o'clock, the said Marshal L. Noel died while on board the said aircraft, en route from New York to Caracas, when the aircraft crashed into the ocean.

4. The death was caused by the wrongful acts, neglect, default, and wilful misconduct of defendant, its servants, agents and employes in the construction, design, maintenance and/or operation of the said aircraft.

5. The said Marshal L. Noel died a resident of Ridgewood, New Jersey, and left surviving him the following:

[2] His widow—Ruth Noel;

His minor daughter—Patricia Noel;

His minor daughter—Sharon Noel;

His minor daughter—Marcia Noel.

6. This action is brought under the Act of March 30, 1920, 41 Stat. 537 (46 U. S. C. §761).

7. By reason of the foregoing, the said plaintiff RUTH NOEL has been damaged in the sum of $3,000,000.

WHEREFORE, plaintiff requests judgment against the defendant in the sum of THREE MILLION ($3,000,000) DOLLARS, together with costs.

s/ HARRY NORMAN BALL
Harry Norman Ball

1010 Packard Building
Philadelphia 2, Pa.

s/ JOSEPH G. FELDMAN
Joseph G. Feldman

s/ LIPPER, SHINN & KEELEY
By AARON LIPPER

The above attorneys, not having an office in the Southern Division or Eastern District of New York, do hereby designate LIPPER, SHINN & KEELEY, at 527 Fifth Avenue, New York 17, N. Y., for the purpose of service of all papers.

s/ HARRY NORMAN BALL
Harry Norman Ball

s/ JOSEPH G. FELDMAN
Joseph G. Feldman

LIPPER, SHINN & KEELEY

By: s/ AARON LIPPER
Aaron Lipper
Attorneys for Plaintiff

Notice of Motion to Dismiss Complaint

[7] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the complaint herein, the defendant will move this Court at a Stated Term thereof for the hearing of motions to be held in Room 506 of the United States Court House at Foley Square in the Borough of Manhattan, County, City and State of New York, on the 31st day of July, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rule 12 of the Rules of Civil Procedure.

(1) Dismissing the complaint herein upon the ground that it purports to assert a claim for damages for wrongful death under the Federal Death on the High Seas Act, 41 Stat. 537, 46 USC 761, and that this Court lacks jurisdiction over the subject matter of such suit brought as a civil jury action, and upon the further ground that such a suit may only be brought by the personal representative of the decedent in a district court of the United States, in [8] admiralty, for the exclusive benefit of the decedent's next of kin; and

(2) Granting such other and further relief as to the court may seem just and proper.

Dated: New York, N. Y., July 25, 1956.

Notice of Motion to Dismiss Complaint

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for Defendant,
80 Broad Street,
New York 4, N. Y.

To:

LIPPER, SHINN & KEELEY, ESQS.,
Attorneys for Plaintiff,
527 Fifth Avenue,
New York 17, N. Y.

Opinion No. 22,887 Granting Motion to Dismiss Complaint

[11] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

HARRY NORMAN BALL, ESQ.,
JOSEPH G. FELDMAN, ESQ.,
1010 Packard Building,
Philadelphia 2, Pa.

LIPPER, SHINN & KEELEY, ESQS.,
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New York 17, N. Y.
Attorneys for Plaintiff.

MORRIS L. WEISBERG, ESQ.,
Of Counsel.

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80 Broad Street,
New York 4, N. Y.

WILLIAM J. JUNKERMAN, ESQ.,
DOUGLAS B. BOWRING, ESQ.,
MAURICE L. NOYER, ESQ.,
Of Counsel.

CASHIN, JOHN M., *U. S. D. J.*

Opinion No. 22,887 Granting Motion to Dismiss Complaint

[12] CASHIN, *D. J.*

Marshal L. Noel was a passenger on an aircraft, owned and operated by the defendant, enroute from New York, N. Y. to Caracas, Venezuela, when the aircraft crashed into the ocean causing his death. His widow brought the present suit as a civil action under the Federal Death On The High Seas Act (41 Stat. 537, 46 USC §§761-767) for death resulting from the wrongful acts, neglects, default and wilful misconduct of the defendant. (Although the complaint does not so state, it is assumed, for the purpose of this motion, that the occurrence giving rise to the action took place, as it must under the Federal Death On The High Seas Act, more than one marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States.) The present motion seeks dismissal of the complaint on the ground that the Court lacks jurisdiction of the subject matter of the suit brought as a civil action and, on the further ground, that the widow is not the proper party plaintiff since the suit must be brought by the personal representative of the decedent.

With the consent of defendant's counsel, the plaintiff, at the argument of the motion, cross-moved for leave to file an amended complaint in the name of the personal representatives of the decedent who had been appointed since the filing of the original complaint setting forth an additional cause of action based [13] on the terms of the "Convention For The Unification of Certain Rules Relating to International Transportation By Air" (49 Stat Part 2, p. 3000, et seq.), commonly called the "Warsaw Convention".

Assuming the complaint to be amended as requested, the plaintiff argues that the cause of action under the

Opinion No. 22,887 Granting Motion to Dismiss Complaint

Federal Death On The High Seas Act may be brought as a civil action and that the Warsaw Convention creates a separate cause of action which may be brought as a civil action. Considering first the question of the proper forum for an action based on the Death On The High Seas Act, the Court does not consider the argument of the plaintiff sound. It is true that authority can be found in this and other districts for the proposition that the statute makes available to a suitor the civil forum (See e.g. *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (S. D. N. Y.); *Batkiewicz* v. *Seas Shipping Co., Inc.*, 53 F. Supp. 802 (S. D. N. Y. 1943); *Sierra* v. *Pan American World Airways, Inc.*, 107 F. Supp. 519 (D. P. R. 1952)). However, more recent cases are to the contrary. *Iafrate* v. *Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S. D. N. Y. 1952); *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (N. D. Cal. 1954); *Higa* v. *Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954), affd. 230 F. 2d 780 (CA 9, 1955). The reasoning in the latter cases is that since no cause of action existed under the general maritime law for wrongful death on the high seas (*The Harrisburg*, 119 US 199) a statutory enactment was necessary to create such a cause of action. When the applicable statute [14] utilized the words "* * * may maintain a suit * * * in admiralty * * *", the admiralty forum was made exclusive. With this reasoning the Court agrees.

The question remains as to whether the Warsaw Convention creates a new cause of action and whether any such newly created cause of action may be brought as a civil action in the District Court. While there was at first some doubt as to whether the Convention was self-executing to any extent (*Choy* v. *Pan American, supra*), there is no doubt at this time that, at least insofar as the Convention creates a rebuttable presumption of liability upon the hap-

pening of the accident (Article 17) and a limitation thereof except upon the showing of wilful misconduct (Article 25) that it is self-executing. Virtually all of the reported cases have not considered the question at issue, apparently because the application of the *lex loci delicti*, with the addition of the Convention presumption and limitation mentioned above, afforded the same rights and liabilities as if a separate cause of action were created. It is obvious, however, that the Convention intended to leave much to the law of the forum (cf. Articles 21, 25(1), 28(2) and 29(2)). There has come to the attention of the Court only three reported cases which considered the instant question—two of these are in the New York State Court and the holdings are contradictory—*Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963; affd. 267 App. Div. 947; affd. 293 N. Y. 878, Cert. den. 324 U. S. 882 holding that [15] no separate cause of action was created by the Convention, and *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. Y.*, 107 N. Y. S. 2d 768; affd. 281 App. Div. 965; leave to appeal denied 282 App. Div. 683; reargument denied 282 App. Div. 837, holding that one was. It is not necessary, however, for the Court to consider which of these holdings is sound since the Court of Appeals for the Second Circuit has settled the issue in the case of *Komlos* v. *Compagnie Nationale Air France*, 209 F. 2d 436 (1953).

The accident giving rise to the Komlos suit occurred on the Island of San Miguel, Azores, Republic of Portugal. The Convention concededly was applicable. Decedent's mother received a notice of compensation award from the Insurance Company. Subsequently both the Insurance Company and the decedent's sister, as administratrix of his estate, instituted suit based on the wrongful death. The District Court for the Southern District of New York (111 F. Supp. 393 (S. D. N. Y. 1952)) held that the Warsaw

Opinion No. 22,887 Granting Motion to Dismiss Complaint

Convention applied but that it created no substantive cause of action, at least so long as the *lex loci delicti* provided such a cause (pp. 401-402) and that the cause of action was assigned, by operation of New York law, to the Insurance carrier because suit had not been instituted by the beneficiary of the compensation award within the time limited. The Court of Appeals reversed the latter holding on the ground that the Portugese law allows the collection of "moral damages", a concept unknown to [16] law of New York. This portion of the cause of action, it was held, could not have been intended to be assigned, as a matter of New York law, to the Insurance Company. To avoid splitting a cause of action it was held that the entire cause should be brought by the Administratrix. It was thus clearly held that the *lex loci delicti* was to be applied by the District Court even though the Warsaw Convention was applicable.

It should be noted that the ends the plaintiffs seek to gain by utilizing the civil rather than the admiralty side of the Court are (1) a jury trial; (2) broader discovery proceedings, and (3) the probability of a less expensive litigation proceeding. It is not contended that the admiralty forum would deny to the plaintiffs their substantive cause of action for wrongful death. Nowhere in the Convention is there any language which can be read to assure any of the advantages sought by the plaintiff.

The motion to dismiss the complaint on the grounds that the Court does not have jurisdiction of the subject matter of the suit as a civil action, is granted. Settle order on notice.

Dated: New York, N. Y., August 22nd, 1956.

JOHN M. CASHIN,
United States District Judge.

Amended Complaint

[32] IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110/388

(Jury Trial Demanded)

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

FIRST COUNT

1. Plaintiff Wm. H. Frantz, one of the Executors of the Estate of Marshal L. Noel, Deceased, is a citizen of the Commonwealth of Pennsylvania. Ruth M. Noel, the other executor of the said Estate, is a citizen of the State of New Jersey. Defendant is a corporation or entity owned by the United States of Venezuela. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. At all times hereafter mentioned defendant was a scheduled air carrier operating outside the continental limits of the United States under an air carrier operating certificate issued by the Civil Aeronautics Board of the

United States of America, and subject to the regulations of the said Civil Aeronautics Board.

3. On or about June 19, 1956, Marshal L. Noel was a fare paying passenger of defendant on an international flight from New York, New York, United States of America to Caracas, United States of Venezuela, on an aircraft owned and operated and controlled by defendant through its servants, agents and employes in the [33] course of their employment, designated as Flight 253, which departed Idlewild Airport, New York, New York, United States of America on or about 11:15 P. M. o'clock June 19, 1956, bound for the United States of Venezuela.

4. Defendant failed to safely transport the said Marshal L. Noel, his baggage and personal effects, from the United States of America to the United States of Venezuela. On the contrary, on or about June 20, 1956, at or about 1:30 A. M. o'clock, the said Marshal L. Noel died while on board the said aircraft which was then in the airspace above the Atlantic Ocean at a point approximately 30 miles from Asbury Park, New Jersey, United States of America.

5. The death of the said Marshal L. Noel and the loss of his baggage and personal effects was caused by the wrongful acts, neglect and default of defendant, its servants, agents and employes in the designing, constructing, equipping, checking, maintaining, repairing and/or operating of the said aircraft.

6. The said Marshal L. Noel left him surviving his widow Ruth M. Noel and his minor children Patricia Noel, Sharon Noel and Marcia Noel.

7. On July 27, 1956, in the Probate Division, Bergen County Court, New Jersey, the last will and testament of

Marshal L. Noel was admitted to probate, and letters testamentary issued to Wm. H. Frantz as Surviving Executor and to Ruth M. Noel, Substitute Executrix.

8. By reason of the foregoing, plaintiffs have been damaged in the sum of Three Million ($3,000,000.) Dollars.

[34] SECOND COUNT

9. Plaintiffs repeat and reallege as part of this claim, each and all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, and 8 of the First Count of this Complaint, with like effect as if herein fully repeated.

10. This claim is brought under the Federal Death on the High Seas Act of March 30, 1920, 41 Stat. 537 (46 U. S. C. Sec. 761).

THIRD COUNT

11. Plaintiffs repeat and reallege, as part of this claim, each and all the allegations contained in paragraphs 1, 2, 3, 4, 6, 7 and 8 of the First Count of this Complaint, with like effect as if herein fully repeated.

12. This claim is brought under the "Convention for Unification of Certain Rules Relating to International Carriage by Air" signed at Warsaw, Poland, October 12, 1929, commonly known as the "Warsaw Convention", to which the United States of America adhered on October 29, 1934 (49 Stat. 3000) and to which the United States of Venezuela adhered in 1956. The authentic and official text of the Warsaw Convention is in the French language.

13. Article 25 of the Warsaw Convention provides that:

> "(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention

qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi tribunal saisi, est considérée comme équivalente au dol.

(2) Ce droit lui sera également refusé si le dommage a été cause dans les mêmes conditions par un de ses préposés agissant dans l'exercise de ses fonctions."

[35] Article 25 appears in translation in 49 Stat. 3000 as follows:

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct, or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

14. The language "* * * *dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol*", means acts or omissions which, in accordance with the law to be applied by the court having jurisdiction over the case, constitute gross negligence, wilful misconduct, recklessness, an act committed without regard for the consequences, and or a conscious breach of a rule established for the purpose of protecting the safety of passengers, of their personal effects and baggage.

Amended Complaint

15. The death of the said Marshal L. Noel and the loss of his personal effects and baggage were caused by acts and omissions of defendant, its agents, servants and employes, which, in accordance with Article 25 of the Warsaw Convention and the law of the United States District Court for the Southern District of New York, constituted gross negligence, wilful misconduct, recklessness, acts committed without regard for the consequences, and/or conscious breaches of rules established for the purpose of protecting the safety of [36] passengers, of their personal effects and baggage—in the designing, construct ag, equipping, checking, repairing, maintaining and/or operating of the said aircraft.

WHEREFORE, plaintiffs request judgment against defendant in the sum of Three Million ($3,000,000.) Dollars, together with costs.

1010 Packard Bldg.
Philadelphia 2, Pa.

HARRY NORMAN BALL
JOSEPH G. FELDMAN

By: s/ HARRY NORMAN BALL
Attorneys for Plaintiffs

The above attorneys, not having an office in the Southern Division of New York, do hereby designate Lipper, Shinn & Keeley, at 527 Fifth Avenue, New York 17, N. Y., for the purpose of service of all papers.

HARRY NORMAN BALL

JOSEPH G. FELDMAN

LIPPER, SHINN & KEELEY
By: s/ AARON LIPPER

Notice of Motion to Dismiss Amended Complaint

[23] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

RUTH NOEL,

Plaintiff,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Sirs:

PLEASE TAKE NOTICE that the defendant will move this Court at a Stated Term thereof for the hearing of motions, to be held in Room 506 of the United States Court House at Foley Square in the Borough of Manhattan, County, City and State of New York, on the 25th day of September, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order,

(1) Dismissing the amended complaint herein bearing the caption:

Notice of Motion to Dismiss Amended Complaint

"In the

UNITED STATES DISTRICT COURT

For the Southern District of New York

Civil Action No. 110-338

(Jury Trial Demanded)

Ruth M. Noel and Wm. H. Frantz, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs,

against

Linea Aeropostal Venezolana,

Defendant."

---

pursuant to Rule 12 of the Rules of Civil Procedure upon the ground that this Court lacks jurisdiction over the subject matter of such a suit brought as a civil jury action.

• • •

Memorandum Referring Motion to Judge Cashin

[28] Sept. 27th 1956

Respectfully referred to Judge Cashin at the request of counsel.

David Edelstein,
U. S. D. J.

Opinion No. 23064 Granting Defendant's Motion to Dismiss Amended Complaint

[37] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 110-388

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

MEMORANDUM

HARRY NORMAN BALL, ESQ.,
JOSEPH G. FELDMAN, ESQ.,
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527 Fifth Avenue,
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Attorneys for Plaintiffs.

MORRIS L. WEISBERG, ESQ.,
Of Counsel.

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for Defendant,
80 Broad Street,
New York 4, N. Y.

WILLIAM J. JUNKERMAN, ESQ.,
DOUGLAS B. BOWRING, ESQ.,
Of Counsel.

CASHIN, JOHN M., *U. S. D. J.*

Opinion No. 23064 Granting Defendant's Motion to Dismiss Amended Complaint

[38] CASHIN, *D. J.*

This is an application to dismiss the plaintiffs' second amended complaint on the ground that the Court lacks civil jurisdiction over the subject matter. The original complaint in this action, as amended on oral argument, was dismissed by this Court on August 22, 1956, on the ground that the Court lacked civil jurisdiction over the subject matter.

On this motion defendant also raises what we consider well-founded objections to the plaintiffs' mode of procedure. However, in the interest of expediting this action, we will consider the plaintiffs' complaint as now amended.

Plaintiffs' original complaint, as amended on oral argument of defendant's original motion to dismiss, alleged two claims for damages for the death of a passenger on an aircraft owned and operated by the defendant, enroute from New York, N. Y. to Caracas, Venezuela, it being alleged that the aircraft crashed into the ocean, causing the passenger's death. The first claim for damages was based on the Federal Death on the High Seas Act (41 Stat. 537, 46 USC §§761-767). The second was based on the "Warsaw Convention".

The Court dismissed the first amended complaint [39] (Cashin, J., Opinion dated August 22, 1956) on the ground that the Federal Death on the High Seas Act, supra, did not give the plaintiffs a civil cause of action but did give them a cause of action in admiralty and, therefore, no cause of action under the "Warsaw Convention".

The complaint now before the Court contains one new or different allegation in that it is now alleged that the decedent passenger died while on board defendant's aircraft, which was then in the airspace above the Atlantic Ocean at a point approximately thirty miles from Asbury Park, New Jersey. Plaintiffs now contend that this allegation places their case outside the admiralty jurisdiction

of the Court and gives them the right to bring an action on the civil side under the "Warsaw Convention".

Neither authority (*Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963; affd. 267 App. Div. 947; affd. 293 N. Y. 878, cert. den. 324 U. S. 882; *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (S. D. N. Y.)), the language of the Statute nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the sea.

We, therefore, do not think plaintiffs' additional [40] or new allegation distinguishes their complaint from its predecessor and so we adhere to our original decision. Defendant's motion to dismiss the complaint on the grounds that the Court does not have jurisdiction of the subject matter of the suit as a civil action, is granted.

Dated: New York, N. Y.
November 29th, 1956.

JOHN M. CASHIN,
United States District Judge.

Notice of Appeal

[50] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

RUTH NOEL,

Plaintiff.

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Civil Action No. 110-388

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

NOTICE IS HEREBY GIVEN that Ruth Noel (Ruth M. Noel) and Wm. H. Frantz, plaintiffs above-named, hereby appeal

Notice of Appeal

to the United States Court of Appeals for the Second Circuit from the order filed in this action on November 29, 1956.

527 Fifth Ave.
New York 17, N. Y.

s/ Aaron Lipper
For Lipper, Shinn & Keeley

s/ Harry Norman Ball
Harry Norman Ball

1010 Packard Bldg.
Philadelphia 2, Pa.

s/ Joseph G. Feldman
Joseph G. Feldman

To: Haight, Gardner, Poor & Havens, Esqs.
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Attorneys for the Defendant